which may be standing to the credit of his account in the Fund, calculated as follows :—

An employee will receive the equivalent of three months' Provident Fund donations for each completed year of service, based on the basic wages paid to him on retirement. For the purpose of this calculation, one month will be taken to mean a month of twenty-six working days. For the purpose of calculating years of service, the Dockyard will be deemed to have commenced operations under the present Management as at 1st January, 1922.

Provided always that the employee retires with the approval of the Management, is not dismissed for misconduct, or is not forced to retire through circumstances occasioned by his own misconduct."

It is with the relation of this Clause to Clauses A and B of the Rules that the question of construction arises.

Clauses A and B are as follows :—

" With effect from 1st April, the Company will set aside monthly a sum equal to five per cent of the basic wage paid to each worker on a daily rate of pay to be credited to an account in each man's name.

With effect from 18th October, 1950, the amount to be credited monthly will be increased to ten per cent of the basic wage.

" The Company will pay to an employee specified in paragraph A, or to his legal personal representatives the sum standing to his credit in the account at the time, in the event of the employment being terminated for any cause."

The Company contends that the intention of Clause C was to ensure a minimum benefit to employees with not less than ten years' service who having attained the age of 55 years should retire with the Company's permission before the 1st October, 1957.

The learned trial judge considered that the the phrasing of Clause C was particularly unfortunate and that the Rules were ambiguous. This opinion resulted from a consideration of hypothetical mathematical results of the two Clauses, B & C, and it appeared to him that when the Company said "an employee will be guaranteed a payment" what they really meant was that an employee would be paid.

I do not think, with respect, that this approach to the matter is correct. In the first place there was no evidence to show, as he held, that in the vast majority of cases the sum payable to an employee under Clause B is a great deal more than the sum alleged to be guaranteed under Clause C. The amounts would be bound to vary considerably according to the dates of retirement and the reason for the introduction of Clause C appears to me to have been to guarantee a minimum payment to long service employees who by early retirement would have acquired only small benefits under Clause B.

It may be that Clause C is unfortunately worded, but I cannot agree that it is ambiguous or that the words "an employee will be guaranteed a payment" should be construed as meaning an employee would be paid. In my view these words mean that the Company gave an undertaking and that it would be straining the ordinary meaning of the word "including" used in Clause C, to construe it as meaning "in addition to."

I therefore find myself in agreement with the appellant's contention and am of opinion that the true construction of Clause C is that the Company guaranteed that the class of employees specified in that clause would receive on retirement a payment, including any sums payable in accordance with Clause A and Clause B, which would not be less than the amount calculated in accordance with the terms set out in the second paragraph of Clause C.

I would therefore allow the appeal, with costs.

Appeal allowed.

Solicitors : *Hogan, Adams & Allan; Lim, Lim, & Oon.*

M. G. SHETH & ORS. v. LAM THYE CO. LTD.

[C. A. (Mathew C.J., Murray-Aynsley C.J.(S), and Hill J.) September 1, 1954]

[Penang — F.M. Civil Appeal No. 36 of 1954]

Sale of Goods — Contract for delivery c.i.f. — Sale by description — Description not trade term, but understood by parties — Goods delivered not corresponding to description — Question of acceptance — Damages.

This litigation arose out of a sale c.i.f. of some Indian tiles. It was a sale by description BYMH Brand 1st Class Roofing Tiles and Ridges (Feroke Size). It appeared from the evidence that "Feroke Size" was not a usual trade description, but did in certain circles bear a particular size and it was understood by the parties to the contract to mean a particular size. The goods shipped by the appellants did not correspond with the description. When the goods arrived the respondents wrote a grumbling letter. Meanwhile the goods were taken from the ship in a lighter; some were landed in Butterworth, the rest were taken to Alor Star where they arrived early in May, for delivery to a sub-purchaser from the respondents.

Held : (1) the respondents' dealing with the consignment constituted an acceptance, and therefore they had lost their right to reject and were confined to their remedy in damages; (2) the question of damages should be referred to the Registrar for assessment after due enquiry, the measure of damages being the difference between the value of the consignment actually received and the value which the consignment would have had had it been delivered in accordance with the correct description.

Cases referred to :—

(1) *Hardy & Co. v. Hillerns & Fowler* (1923) 2 K.B. 490.

(2) *Varley v. Whipp* (1900) 1 Q.B. 513.

COURT OF APPEAL.

S. Thillaimuthu for the appellants.

Ong Huck Lim for the respondents.

Cur. Adv. Vult.

Mathew C.J. : — The respondents entered into a contract with the appellants for the delivery c.i.f. at Penang of 100,000 roofing tiles and 2,000 ridges. The description was BYMH brand First Class Roofing Tiles and Ridges (Feroke Size). The evidence showed clearly that Feroke Size, though not a trade term, was understood by the parties to mean a particular size.

The tiles and ridges when delivered were neither BYMH brand nor the size contracted for. The tiles and ridges were off-loaded into lighters; part of the shipment was taken to Pematang Pau and the remainder were carried onwards to Alor Star for delivery to a sub-purchaser from the respondents.

The only point in this appeal which requires consideration is whether the respondents accepted the consignment. In my view, their dealing with the consignment constituted an acceptance. The letter of 17th April, 1953 from the respondents to the second appellant did no more than suggest a settlement. In my view, on the authority of *Hardy & Company v. Hillerns & Fowler*[1], the respondents had already accepted the consignment, when the letter of 9th June, 1953 was written by the respondents' solicitors. The respondents had lost their right to reject and were confined to their remedy in damages.

The question of damages should be referred to the Registrar for assessment after due enquiry, the measure of damages being the difference between the value of the consignment actually received and the value which the consignment would have had had it been delivered in accordance with the contract description.

The appellants have only succeeded in part in this appeal, and I would therefore award no costs in the appeal. The deposit should be paid to the appellants if the costs in the lower Court have been paid.

Murray-Aynsley C.J. (S.) (with whom **Hill J.** agreed) : — This litigation arose out of a sale c.i.f. of some Indian tiles. It was a sale by description BYMH Brand 1st class roofing tiles and ridges (Feroke size).

It appeared from the evidence that the expression "Feroke size" was not a usual trade description. It does, however, appear that this term does in certain circles bear a particular size and it was understood by the parties to the contract to bear a particular size. The goods shipped by the appellants did not correspond with the description; they were not BYHM brand and they were not of the required size. The respondents in the circumstances were entitled to reject the goods delivered.

When the goods arrived the respondents wrote a grumbling letter on April 7th. It is contended that this letter constituted an acceptance. I do not think it did (cf. a similar sort of letter in *Varley v. Whipp*[2]). It certainly did not constitute a rejection.

Meanwhile the goods were taken from the ship in a lighter. Some were landed in Butterworth, the rest were taken in the same lighter to Alor Star where they arrived early in May, for delivery to a sub-purchaser from the respondents. In my opinion this dealing with the goods constituted an acceptance. (*Hardy & Co. v. Hillerns & Fowler*[1]). Therefore a letter which was sent on June 9th by the respondents' solicitors cannot operate as a rejection. In this respect I differ from the learned trial Judge. The respondents are entitled to damages.

I agree with the order proposed by the President both as regards the damages and as to costs.

Order accordingly.

Solicitors: *Conaghan, Wreford & Thornton; Ong Huck Lim & Co.*

K. S. ABDUL KADER v. M. K. MOHAMED ISMAIL

[C. A. (Mathew C.J., Murray-Aynsley C.J.(S), and Spenser Wilkinson J.) October 8, 1954]

[K.L. — F.M. Civil Appeal No. 46 of 1954]

Arbitration — Agreement that arbitrators should give award after considering written statements of parties and supporting statements — Award based on part of answers to questions put to one party — Procedure adopted by arbitrators disapproved.

This was an appeal against an order that an arbitration award be adopted and enforced. The point in this appeal was whether the award was a valid one. It was agreed between the parties to the arbitration that the arbitrators should give the award after considering the written statements of the parties and supporting documents and that no evidence was to be called. When the award was delivered, it appeared that the arbitrators, before making it, questioned the appellant on certain of the matters which were in dispute, and clearly based their decision on part of the answers given by him.

Held: (1) the arbitrators were influenced in arriving at their decision on the issue in question by what they were told by the appellant; (2) the Court ought to show disapproval of the procedure adopted by the arbitrators.

Cases referred to :—

(1) *W. Ramsden & Co. Ltd. v. Jacobs* (1922) 1 K.B. 640.